(19,191.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 169.

JOHN B. HUMPHREY, PLAINTIFF IN ERROR,

vs.

CHARLES T. TATMAN, TRUSTEE IN BANKRUPTCY OF NELSON H. DAVIS.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

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1 UNITED STATES OF AMERICA, *ss:*

[Seal of the Circuit Court, Massachusetts.]

The President of the United States to the honorable the judges of the superior court of the Commonwealth of Massachusetts, holden at Worcester, within and for the county of Worcester, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said superior court before you, or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in the suit between Charles T. Tatman, trustee in bankruptcy of Nelson H. Davis plaintiff and John B. Humphrey defendant, in a plea of contract wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or authority exercised under said State on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said defendant as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within thirty days from this date in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 14th day of December, in the year of our Lord one thousand nine hundred and three.

ALEX. H. TROWBRIDGE,
Clerk of the Circuit Court of the United States,
District of Massachusetts,
By BENJ. H. BRADLEE, *Deputy Clerk.*

Allowed by
ALBERT MASON,
Chief Justice Superior Court.

1—169

2 COMMONWEALTH OF MASSACHUSETTS, *Worcester,* } *ss:*

And now, here, the judges of the superior court make return of this writ by annexing hereto and sending herewith, under the seal of the said superior court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

Seal of the Superior Court.

In testimony whereof, I Theodore S. Johnson, clerk of said superior court for said county of Worcester, have hereto set my hand and the seal of said court this thirty-first day of December A. D. 1903.

THEODORE S. JOHNSON, *Clerk.*

3 Know all men by these presents, that we, John B. Humphrey of Boston, in the county of Suffolk and Commonwealth of Massachusetts, as principal, and Eunice H. Allen of said Boston and William A. Thompson of Medford in the county of Middlesex in said Commonwealth, as sureties, are held and firmly bound unto Charles T. Tatman, trustee in bankruptcy of the estate of Nelson H. Davis, bankrupt, in the full and just sum of three thousand dollars, to be paid to the said Charles T. Tatman, trustee, or his successors, certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this fourteenth day of December, in the year of our Lord one thousand nine hundred and three.

Whereas, lately at a sitting of the superior court, within and for the county of Worcester in said Commonwealth of Massachusetts in a suit depending in said court, between said Charles T. Tatman, trustee, as plaintiff and said John B. Humphrey as defendant, a judgment was rendered against the said John B. Humphrey and the said John B. Humphrey having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse
4 the judgment in the aforesaid suit, and a citation directed to the said Charles T. Tatman, trustee, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said John B. Humphrey shall prosecute his writ of error to effect, and answer all damages and costs if he fail to make his plea good,

then the above obligation to be void; else to remain in full force and virtue.

JOHN B. HUMPHREY. [SEAL.]
EUNICE H. ALLEN. [SEAL.]
WILLIAM A. THOMPSON. [SEAL.]

Sealed and delivered in presence of—
EDWARD J. JONES,
To all.

Approved by—
ALBERT MASON,
Chief Justice Superior Court of Massachusetts.

SUFFOLK, *ss:*

DECEMBER 16TH, 1903.

The within named sureties and bond are approved by me.

EDWARD J. JONES,
Master in Chancery.

WORCESTER, *ss:*

DECEMBER 17, 1903.

I approve of the within bond.

CHARLES T. TATMAN, *Trustee.*

(Endorsed:) Charles T. Tatman, trustee, *vs.* John B. Humphrey. Bond. Copy. Bond approved by Albert Mason, chief justice of superior court, and filed December 19th, 1903. Attest: T. S. Johnson, clerk.

A true copy of said bond &c.

[Seal of the Superior Court.]

Attest: T. S. JOHNSON, *Clerk.*

[Endorsed:] # 375. Charles T. Tatman, Tr. *vs.* John B. Humphrey. Copy of bond.

6 COMMONWEALTH OF MASSACHUSETTS, *Worcester,* } *ss:*

To all persons to whom these presents shall come, Greeting:

Know ye that among the records of our superior court, begun and holden at Fitchburg, within and for our said county of Worcester, on the first Monday of November, being the second day of said month, in the year of our Lord one thousand nine hundred and three, it is thus contained, the following being the entire record in the case:

7 COMMONWEALTH OF MASSACHUSETTS, } ss:
Worcester, }

[L. S.]

To the sheriffs of our several counties or their deputies, Greeting:

We command you to attach the goods or estate of John B. Humphrey of Boston in the county of Suffolk to the value of three thousand dollars, and summon the said defendant (if he may be found in your precinct) to appear before our justices of our superior court, at Worcester, within and for our said county of Worcester, on the first Monday of December next; then and there, in our said court, to answer unto Charles T. Tatman of the city and county of Worcester, as he is trustee in bankruptcy of the estate of Nelson H. Davis of said Worchester. In an action of tort.

To the damage of said plaintiff, as he saith, the sum of three thousand dollars, which shall then and there be made to appear, with other due damages. And have you there this writ, with your doings therein.

8 Witness, Albert Mason, Esquire, at Worcester, the thirteenth day of November in the year of our Lord one thousand nine hundred and one.

T. S. JOHNSON, *Clerk.*

Plaintiff gives notice that he desires a trial by jury.

And acceptance of service was on said thirteenth day of November signified by the defendant in the words following, to wit:

BOSTON, *November* 13, 1901.

Service of the within writ is hereby accepted.

JOHN B. HUMPHREY,
By WM. H. BROWN, *His Att'y.*

I appear for the defendant Humphrey.

WM. H. BROWN.

9 This action was entered in this court at the December return day, 1901, when the parties appeared, and on the second day of December, 1901, the plaintiff filed his declaration as follows, to wit:—

WORCESTER, *ss:*

Superior Court, December, 1901.

CHARLES T. TATMAN, Trustee,
vs.
JOHN B. HUMPHREY.

Plaintiff's Declaration.

Count 1. And the plaintiff says that he is the duly appointed trustee in bankruptcy of Nelson H. Davis of said Worcester and has given bond and qualified as such trustee; that said Davis filed a voluntary petition in bankruptcy and was adjudged a bankrupt on the twenty-third day of May, A. D. 1901. Said Davis on or about the thirtieth day of April, 1901, being insolvent, transferred to the defendant, who was then one of said Davis's creditors, the large and valuable stock of goods belonging to said Davis, with intent
10 on his part to hinder, delay and defraud his creditors and to prefer the defendant over his other creditors; and permitted the defendant to remove and conceal the said stock of goods with intent to hinder, delay and defraud the creditors of said Davis; and that the defendant, having reasonable cause to believe and knowing said Davis to be insolvent, and having reasonable cause to believe that a preference was intended, took said stock of goods, removed and concealed the same and appropriated the same to his own use; that said transfer, taking, removing, concealing and appropriating were in fraud of the provisions of the acts of Congress in such case made and provided. And the plaintiff, after his appointment and qualification as trustee in bankruptcy of said Davis, as aforesaid, duly demanded said goods from the defendant, but that the defendant refused to return them to the plaintiff. Wherefore the plaintiff claims damages.

Count 2. And the plaintiff says the defendant has converted *ro* his own use the stock of goods belonging to Nelson H. Davis of said Worcester, of whom the plaintiff is the duly appointed and qualified trustee in bankruptcy; wherefore the plaintiff claims dam-
11 ages.

The above two counts are for one and the same cause of action.

CHARLES T. TATMAN,
Trustee in Bankruptcy of Nelson H. Davis.

Filed Dec. 2, 1901.

12 And on the twenty-seventh day of December, 1901, the defendant filed his answer to plaintiff's declaration as follows, to wit. —

COMMONWEALTH OF MASSACHUSETTS, *Worcester,* } ss:

Superior Court.

CHARLES T. TATMAN, Trustee,
vs.
J. B. HUMPHREY.

Defendant's Answer.

Now comes the defendant and denies each and every allegation of the plaintiff's writ and declaration and of each and every count of the said declaration.

WM. H. BROWN,
By His Attorney.

Filed Dec. 27, 1901.

13 And on the 2nd day of April, 1903, plaintiff waives his claim for jury in the words following, to wit:—

COMMONWEALTH OF MASSACHUSETTS, *Worcester,* } ss:

Superior Court, April 2, 1903.

CHARLES T. TATMAN, Trustee, Pl'f,
vs.
JOHN B. HUMPHREY, Def't.

The plaintiff in said case waives his claim for a trial by jury.

CHARLES T. TATMAN,
Att'y for Pl'ff.

Filed April 2, 1903.

14 And on the 11th day of May, 1903, the plaintiff and defendant filed a statement of agreed facts in the words following, to wit:—

COMMONWEALTH OF MASSACHUSETTS, *Worcester*, } ss:

Superior Court.

CHARLES T. TATMAN, Trustee,
vs.
JOHN B. HUMPHREY.

Statement of Agreed Facts.

This is an action of tort to recover the value of a stock of jewelry alleged to have been converted by the defendant to his own use and the case is submitted to the judgment of the court on the following statement of agreed facts.

The plaintiff is the duly appointed trustee in bankruptcy of Nelson H. Davis of said Worcester, who was at the time of the acts which are the foundation of this action, and had been for some years, a retail dealer in jewelry, watches and diamonds, carrying on business in the ordinary way in a store in Worcester, and the said
15 Humphrey was a wholesale dealer in diamonds in Boston.

Said Davis filed a voluntary petition in bankruptcy on the twenty-third day of May, A. D. 1901, and was adjudged a bankrupt on the same day. He owed considerable amounts for merchandise forming a part of his stock in trade, to a large number of creditors, of whom said Humphrey was the largest creditor, and his only property of any value consisted of the stock of goods and the fixtures in his store, which fixtures were mortgaged to the Worcester Collateral Loan Association for their full value by a mortgage executed and recorded about a month before the bankruptcy proceedings.

On the sixth day of March, A. D. 1899, the said Humphrey paid and discharged a debt of three thousand dollars due from said Davis to Morrill Brothers of Boston together with the chattel mortgage securing the said debt and took said Davis's promissory notes for three thousand dollars, and at the same time in consideration of said payment by said Humphrey said Davis duly executed and delivered to said Humphrey a mortgage, a mortgage in the usual form of mortgages of personal property, which covered the stock of goods and the fixtures which said Davis then had, and such future additions as he should make thereto, to secure the payments of said notes to said Humphrey and to secure future indebtedness.
16 Said mortgage provided that upon default the mortgagee should have the right to take immediate possession of all the property included within its terms and to remove the same. During the year 1899 further sales were made by said Humphrey to said Davis and the indebtedness under said mortgage was increased to forty-seven hundred dollars, which was the amount due when the defendant took possession of the stock. Said mortgage was never

recorded. Said Davis at the time of making said mortgage was not insolvent. In February, 1901, said Davis made a statement to certain of his creditors and to mercantile agencies that there was no incumbrance on his stock or fixtures (if the fact is material as against this defendant). On the thirtieth day of April 1901, having become dissatisfied with said Davis's payments and having reasonable cause to believe that said Davis was insolvent, and the said Davis being in default of his payments and otherwise in default under said mortgage, the defendant, acting under the powers given by said mortgage, took possession of said Davis's stock of goods and retained them in the store occupied by said Davis till May 1, 1901. Upon taking possession of the goods, the defendant became informed of the fact that said Davis was insolvent and on the following day, to wit, May 1, 1901, removed said goods to a storehouse in Boston and continued in possession of said goods thereafter.

17 On May 13, 1901, the defendant duly served a notice of his intention to foreclose said mortgage under the provisions of the Public Statutes, chapter 192, sections 7 and 9. All the goods taken were included within the terms of said mortgage and had been owned by said Davis and included in the terms of said mortgage for more than four (4) months previous to the filing of said petition in bankruptcy by said Davis. The goods were taken by the defendant against the expressed wish and the protests of said Davis and without his assistance. At the time of the taking possession and removal, there was no present consideration for the transfer of any of the goods, no advance having been made to said Davis after 1899. Said Davis was insolvent but was not contemplating bankruptcy before the taking of the goods and said taking forced him into bankruptcy. The plaintiff was appointed and qualified as trustee on June 18, 1901. He was immediately informed by the defendant of what had been done and that the defendant would deliver up the said goods upon the payment of the amount due under said mortgage. As soon as the plaintiff qualified as trustee he demanded said goods, but the defendant refused to give up the goods unless he was paid the amount due under said mortgage, which had accried before said taking of possession of the goods by the defendant and which

18 was still due and claimed the right to retain possession under his mortgage. The plaintiff refused to pay the defendant anything and claimed that the said mortgage did not justify the defendant in retaining the said goods. It is agreed that the amount owing from said Davis to said Humphrey under said mortgage at the time the defendant took possession of the said goods, and from that time to the date of plaintiff's writ, was in excess of the value of the goods. The value of the goods was $2,500.00 on May 1, 1901, and at the time of the alleged conversion, on account of which this action is brought.

CHARLES T. TATMAN,
Attorney for Plaintiff.
WILLIAM H. BROWN,
Attorney for Defendant.

Filed May 11, 1903.

19 And on the said 11th day of May, 1903, the cause having been heard, the court found for the defendant, as follows, to wit:

WORCESTER, *ss:*

Superior Court, May, 1903.

In the action Charles T. Tatman, trustee, against John B. Humphrey the court finds for the defendant *pro forma.*

F. A. GASKILL,
Justice of the Superior Court.

Filed May 11, 1903.

And on the 1st day of June, 1903, judgment was ordered for the defendant upon the finding of the court, from which judgment the plaintiff appealed to the next sitting of the supreme judicial court, to be holden for this county, and thence the case was continued.

20 And afterwards, to wit,—on the 27th day of November, 1903, the parties appeared and it was ordered by said supreme judicial court, by its rescript, as follows, viz.:—

COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth, at Boston, Nov. 25, 1903.

In the case of Charles T. Tatman *vs.* John B. Humphrey pending in the superior court for the county of Worcester—

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court; viz.,—judgment for the plaintiff.

By the court,

HENRY A. CLAPP, *Clerk.*

November 25, 1903.

Filed November 27, 1903.

It is therefore considered by court, to wit;—on the seventh day of December 1903, that the said Charles T. Tatman, trustee as aforesaid, recover against the said John B. Humphrey the sum of two thousand eight hundred and ninety dollars damage, and costs of suit taxed at sixty-one dollars and forty-five cents.

21 All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof we have hereunto caused the seal of our said court to be hereto affixed.

Witness, Albert Mason, chief justice of our said superior court, at Worcester, in said county, this thirty-first day of December in the year of our Lord one thousand nine hundred and three.

[Seal of the Superior Court.]

T. S. JOHNSON, *Clerk.*

22 COMMONWEALTH OF MASSACHUSETTS, *Worcester*, } ss:

Superior Court.

CHARLES T. TATMAN, Trustee in Bankruptcy of the Estate of Nelson H. Davis,
v.
JOHN B. HUMPHREY.

To the Honorable Albert Mason, chief justice of the superior court of Massachusetts:

The defendant in this cause complains that on December 7th, 1903, judgment was entered by the superior court aforesaid within and for the county of Worcester in said Commonwealth in favor of the plaintiff in this cause in the sum of twenty-five hundred dollars ($2500) against the defendant in this cause.

That said judgment was rendered in this cause, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a mani-
23 fest error hath happened, to the great damage of the said defendant, as he is deprived thereby of the sum of $2500, which sum he is entitled to and ought of right to have.

Wherefore said defendant in order that said error may be duly corrected, prays that you will allow him a writ of error to the Supreme Judicial Court of the United States and that you will issue a citation to said plaintiff upon said writ of error so that said Supreme Court may cause further to be done therein to correct that error what of right according to the laws and custom of the United States should be done.

JOHN B. HUMPHREY.

HENRY W. PUTNAM,
WM. H. BROWN,
Att'ys for J. B. Humphrey.

24 *Assignment of Errors.*

In the Supreme Court of the United States.

JOHN B. HUMPHREY, Plaintiff in Error,
v.
CHARLES T. TATMAN.

The plaintiff in error in this cause avers that the superior court within and for the county of Worcester and Commonwealth of Massachusetts, erred in the rendition of judgment in this cause in favor of the plaintiff in the cause in said court, to wit: Charles T. Tatman, trustee, and against this plaintiff in error—defendant in said court—in the sum of $2500 and assigns the following errors, to wit:

First. The court erred in entering a judgment for the defendant in error upon the agreed facts.

Second. The court erred in deciding that the title of the plaintiff in error under his mortgage was defeated and terminated by the bankruptcy proceedings of Nelson H. Davis, bankrupt, and that the defendant in error could recover the value of the property by authority of the United States bankruptcy act of 1898.

Third. The court erred in deciding that the act of 1898 of the United States bankruptcy law makes the result by the creditor and not the specific intent of the debtor the essential fact and that the intent of the debtor and creditor *were* immaterial.

Fourth. The court erred in deciding that "in the case of a preference by way of an unrecorded chattel mortgage, the transfer dates, under the bankruptcy act of 1898, and the amendatory act of February 5, 1903, from the acquisition of the possession under the mortgage."

25 *Fifth.* The court erred in the construction of the bankruptcy act of 1898 and in its application to this case, and especially in the construction of sects. 60*a*, 60*b*, 67*d*, 67*e* and 70*e* of said bankruptcy act.

Sixth. The court erred in deciding against the privilege and exemption claimed by the plaintiff in error under the United States bankruptcy act of 1898 and especially under sects. 67*d*, 67*e*, 70*e*, 60*a* and 60*b* of said act (U. S. St. at Large 1898, chap. 541).

Wherefore the plaintiff in error prays that said judgment may be reversed.

JOHN B. HUMPHREY,
By HENRY W. PUTNAM AND
WM. H. BROWN,
His Attorneys.

26 COMMONWEALTH OF MASSACHUSETTS:

BOSTON, *December* 15, 1903.

I certify the annexed to be a true copy of the opinion of the supreme judicial court in the case of Charles T. Tatman *vs.* John B. Humphrey decided on the 25th day of November, 1903.

HENRY WALTON SWIFT,
Reporter of Decisions.

27 TATMAN, Tr.,
v.
HUMPHREY.

KNOWLTON, *C. J.*:

The question in this case is whether the defendant's title under an unrecorded mortgage of personal property, made to him more than two years before the bankruptcy of the mortgagor, which covered the stock of goods and fixtures then owned by the mortgagor and such future additions as he should make thereto, and which was made to secure payment of certain notes and of future indebtedness, is good against the trustee in bankruptcy of the mortgagor. Under the R. L. c. 198, § 1, because of the failure to record the mortgage within fifteen days of the date written therein, and because the property had not been delivered to and retained by the mortgagee, the mortgage was not valid against any person other than the parties thereto. Haskell *v.* Merrill, 179 Mass., 120. About three
28 weeks before the commencement of the proceedings in bankruptcy, the mortgagor then being insolvent and the defendant having reasonable cause to believe him insolvent, the defendant took possession of the property covered by the mortgage, by removing it from the mortgagor's store, and afterwards retained it. After taking possession he served a notice of his intention to foreclose the mortgage under the provisions of the Pub. Sts. c. 192, §§ 7–9.

The defendant's acquisition of possession of the mortgaged property before the commencement of the proceedings in bankruptcy, and before third persons had acquired liens or rights by attachment or otherwise, gave him a title which was good at common law against creditors, and which would have been good against an assignee in insolvency under the statutes of this Commonwealth, or against an assignee in bankruptcy under the United States bankruptcy act of 1867. Folsom *v.* Clemence, 111 Mass. 273; Chase *v.* Denny, 130 Mass. 566; Blanchard *v.* Cook, 144 Mass. 207; Bennett *v.* Bailey, 150 Mass. 277; Bliss *v.* Crosier, 159 Mass. 498; Haskell *v.* Merrill, 179 Mass. 120; Gibson *v.* Warden, 14 Wall. 277; Sawyer *v.* Turpin, 91 U. S. 114.

The question of difficulty in the case arises under the United States bankruptcy act of 1898, whose provisions in regard to prefer-

ences and acts of bankruptcy differ materially from those of the bankrupt act of 1867. In Wilson Bros. *v.* Nelson, 183 U. S.
29 191, (7 Am. B. R. 142), the Supreme Court of the United States, in an elaborate opinion, discussed this difference, and pointed out its effect in cases similar to the present. In that case the bankrupt when solvent, nearly thirteen years before his bankruptcy, gave an irrevocable power of attorney to confess judgment for a debt which he then contracted, and this power was exercised by the creditor shortly before his bankruptcy.

Among the acts of bankruptcy mentioned in section three of the act, one is defined as follows: Having "suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged such preference." In section 67*f*, it is provided "that all levies, judgments, attachments or other liens obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him shall be deemed null and void in case he is adjudged a bankrupt and the property affected by the levy, judgment, attachment or other lien, shall be deemed wholly discharged and released from the same," etc. In section 67*e*, it is declared that "a lien created by or obtained in or pursuant to any suit or proceeding, at law or in equity, including a judgment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against
30 such person, shall be dissolved by the adjudication of such person to be a bankrupt, if it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference," etc. In view of these and other provisions of the act, it was decided, in the case just cited that suffering and permitting the creditor to obtain a preference through legal proceedings was an act of bankruptcy by the express provisions of the statute, irrespective of any active intent of the debtor at that time, to hinder, delay or defraud his creditors, or to give a preference, and notwithstanding that the power of attorney to confess judgment was given many years before, and it was said that the preference could be avoided and the property recovered by the trustee. It was held that in determining the time of an alleged act of bankruptcy, it must be deemed to have occurred when something open and notorious was done affecting the debtor's estate. It is also said in the opinion that "the act of 1898 makes the result obtained by the creditor, and not the specified intent of the debtor, the essential fact."

Under another clause of the statute the same distinction is drawn between this and the former act in the case of *In re* Klingman, 101 Fed. Rep. 691 (4 Am. B. R. 254) where it is said that "the intent of this section is to declare that, as against creditors of an insolvent, the limitation of time for invoking relief against a preference, does

not begin to run until in some form they have received actual
31 or constructive notice of the transfer to the preferred creditor, and this intent is reached by the declaration that in such cases the transfer constituting the act of bankruptcy shall be held to date from the time the instrument of transfer is recorded, or the possession is taken, or notice is otherwise brought home to the creditors of the bankrupt." The facts in this case were somewhat analogous in principle to those in the case at bar. Other Federal decisions tend in the same direction. White *v.* Bradley Timber Company, 119 Fed. Rep. 989. *In re* Metzer Toy and Novelty Company, 114 Fed. Rep. 957. *In re* Edward W. Wright Lumber Company, 114 Fed. Rep. 1011. *In re* Sheldon, 3 Am. B. R. 554.

Even though the proceedings by which the mortgagee obtained his lien, three weeks before the filing of the petition, were not proceedings in court, and not legal proceedings if the term is construed narrowly, they were proceedings to enforce his legal rights. If the present case is not covered by the decision in Wilson Bros. *v.* Nelson, *ubi supra*, the principles upon which the two cases rest are very similar.

In section 3*a*, one of the acts of bankruptcy mentioned is having "transferred while insolvent any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors." In the same section under *b*, the time for filing a petition founded on such an act of bankruptcy is within four months after "the date of the recording or registering of the transfer or assignment * * * if by law such recording or registering is required or permitted, or if it is not, from the date when the beneficiary takes notorious, exclusive or continuous possession of the property unless the petitioning creditors have received actual
32 notice of such transfer or assignment."

In view of these several provisions, and the language of section 60*a* and 60*b*, and the construction put upon the statute by the Supreme Court of the United States, we are of opinion that, in the case of a preference by way of an unrecorded chattel mortgage, the transfer dates, under the bankruptcy act of 1898, and the amendatory act of Feb. 5, 1903, from the acquisition of possession under the mortgage.

In Matthews *vs.* Hart, 79 App. Div. 570 (9 Am. B. R. 373) the appellate division of the supreme court of New York, in a well considered opinion, made a decision which entirely covers the present case. The court held that the preference should be deemed to have been obtained at the time "when possession was taken, though the taking of possession was merely to effectuate an agreement made in good faith and many months before the prohibited time for making the transfer."

The case at bar certainly falls within the spirit and reason of the statute as interpreted in these decisions. The reason for the enactment as it is interpreted is well illustrated by the fact that the mortgagor in this case, less than four months before the proceedings in

bankruptcy, made a statement to certain of his creditors and to commercial agencies, that there was no incumbrance on his stock or fixtures, a statement which was literally true if we look only to the state of the title as against creditors, but wickedly false in its understood meaning if the mortgagee, on the eve of the debtor's
33 bankruptcy, could take all of the debtor's property and leave nothing for the other creditors who had trusted him because of his possessions.

Judgment for the plaintiff.

33½ [Endorsed:] Tatman *vs.* Humphrey Certified copy of the opinion of the supreme judicial court.

34 UNITED STATES OF AMERICA, *ss:*

To Charles T. Tatman, trustee in bankruptcy of the estate of Nelson H. Davis, bankrupt, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the superior court of Massachusetts in and for the county of Worcester wherein John B. Humphrey is the plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Albert Mason, chief justice of the superior court of the Commonwealth of Massachusetts, this fourteenth day of December, in the year of our Lord one thousand nine hundred and three.

ALBERT MASON,
Chief Justice of the Superior Court of Massachusetts.

35 WORCESTER, MASSACHUSETTS, *December* 14, 1903.

Due service of the within writ is hereby accepted.

CHARLES T. TATMAN,
Trustee as Alleged.

The clerk of the Supreme Court of the United States will please record my appearance for the defendant in error.

CHARLES T. TATMAN.

Charles T. Tatman, attorney at law, 311 Main street, Worcester, Mass.

36 COMMONWEALTH OF MASSACHUSETTS, *Worcester*, } ss:

Superior Court.

I, Theodore S. Johnson, clerk of the superior court, within and for the county of Worcester, hereby certify that the foregoing are true copies of

I. The record in the case of Charles T. Tatman, trustee in bankruptcy of the estate of Nelson H. Davis, against John B. Humphrey, in an action of tort brought in said superior court determined; and annexed to and transmitted with said record, of

II. The application for writ of error and the assignment of errors.

III. The opinion of the full court and of all the proceedings in said case, with all things concerning the same, together with

IV. The original citation and the acceptance of service thereon.

In witness whereof I have hereto set my hand and the seal of said court this thirty-first day of December, in the year of our Lord one thousand nine hundred and three.

Seal of the Superior Court.

T. S. JOHNSON, *Clerk.*

37 [Endorsed:] # 375. Charles T. Tatman, trustee, pl'ff in error, *vs.* John B. Humphrey.

Endorsed on cover: File No. 19,191. Massachusetts superior court. Term No. 169. John B. Humphrey, plaintiff in error, *vs.* Charles T. Tatman, trustee in bankruptcy of Nelson H. Davis. Filed January 8, 1904. File No. 19,191.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 169.

JOHN B. HUMPHREY, PLAINTIFF IN ERROR,

vs.

CHARLES T. TATMAN, TRUSTEE IN BANKRUPTCY OF NELSON H. DAVIS.

BRIEF OF PLAINTIFF IN ERROR.

The defendant in error, Tatman, is the trustee in bankruptcy of Nelson H. Davis. The petition in bankruptcy was filed by said Davis May 23, 1901, and previous to that on March 6, 1899, the said bankrupt gave to the plaintiff in error, Humphrey, a mortgage as security for the sum of $3,000 paid out in behalf of said Davis for the discharge of his debt, and for the discharge of a similar mortgage to Morrill Brothers. The mortgage to the plaintiff, Humphrey, secured future advances, which were made and which increased the amount of the debt to $4,700. The value of the goods was $2,500 at the time of the alleged conversion. The said mortgage to the plaintiff was not recorded. The debtor being in default under the mortgage, the plaintiff, having reasonable cause to believe him insolvent, took possession of the property. Possession was taken by the plaintiff against the expressed wish and the protests of the debtor and without his assistance. Later foreclosure proceedings were begun. According to the decision of the Court, this mortgage was given and received in entire good faith for a valuable consideration, and the rights of the plaintiff to the goods secured by said mortgage are good as against all persons in the world unless the defendant is to be excepted. (See decision of the Supreme Judicial Court of Massachusetts, p. 12 of the record.) The question to be determined is whether under the Bankruptcy Act of 1898 the plaintiff's rights are good as against the defendant.

Wherever the words "plaintiff" and "defendant" are used in this brief, reference is made to the plaintiff in error and the defendant in error.

I.

The plaintiff's writ of error presents a Federal Question.

The case was presented on agreed facts and all questions were open without regard to the pleadings and the whole Bankruptcy Act so far as it had application was under consideration.

Roxbury *vs.* Minot, 114 Mass. 546.
Fay *vs.* Duggan, 135 Mass. 242.

The pleadings set up the statute and rights under it, and the decision of the case necessarily involved its construction.

Green Bay Canal Co. *vs.* Patten Paper Co., 172 U.S. 58.

The plaintiff is entitled to an exemption under the provision of the Bankruptcy Act, Section 67d, which provides that "Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act."

The decision of the Court did not protect the rights of the plaintiff under this clause of the statute, and the decision was against its authority.

The plaintiff is further entitled to an exemption under Section 60b. This section provides, "If a bankrupt shall have given a preference within four months before the filing of a petition . . . and the person receiving it . . . shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee." . . .

The provisions for the creditor occupy the principal part of this section, and amount to an exemption by special provision of the statute. Where there are provisions in behalf of both the creditor and the trustee, a decision in favor of either party would be a decision against the authority of that portion of the statute which is for the protection of the other. The decision of the Court in favor of the trustee was a decision against the protection which the plaintiff claims under the first part of this section, and is against its authority.

The same is true with reference to Section 67e, which excepts "purchasers in good faith and for a present and fair consideration."

In all of the sections the "four months" provision amounts to an exemption.

In Belden *vs.* Chase, 150 U.S. 674, it was held that a failure to apply the correct construction of certain navigation regulations

amounted to the deprivation of rights which gave a right to a Writ of Error. This case goes farther than is necessary in the case at bar, for the plaintiff in that case claimed rights indirectly under the regulations. If the bankruptcy statute has been wrongly construed, it is a denial of the plaintiff's rights expressly set out in the statute.

See also the following cases:

Palmer *vs.* Hussey, 119 U.S. 96.
Ker *vs.* Illinois, 119 U.S. 436.
Boyd *vs.* Thayer, 143 U.S. 135.
Wabash R.R. *vs.* Pearce, 192 U.S. 179.
Factors, Etc., Ins. Co. *vs.* Murphy, 111 U.S. 738.
Traer *vs.* Clews, 115 U.S. 528.
Williams *vs.* Heard, 140 U.S. 529.
Bullis *vs.* O'Beirne, 195 U.S. 606.

See also the words in Metcalf *vs.* Barker, 187 U.S. 165,174.

"Where the lien is obtained four months prior to the filing of the petition it is not only not to be deemed null and void on adjudication, but its validity is recognized."

II.

The construction of the Bankruptcy Statute by the Massachusetts Court was erroneous.

The plaintiff is entitled to the protection of the statute.

The decision of the Massachusetts Court was (p. 12 of the record): "The defendant's acquisition of possession of the mortgaged property before the commencement of the proceedings in bankruptcy, and before third persons had acquired liens or rights by attachment or otherwise, gave him a title which was good at common law against creditors, and which would have been good against an assignee in bankruptcy under the United States Bankruptcy Act of 1867."

The plaintiff should have the same protection under the act of 1898 as the act of 1867 gave.

The mortgage had stood for more than two years unrecorded, and possession had been taken about three weeks before the filing of the petition.

First. It was necessary to take possession of the property to make the mortgage effective against others than the parties thereto. The demands of the local law were, however, satisfied by the possession taken and the possession related back to the delivery of the mortgage, and made it good from the beginning.

Mitchell *et al. vs.* Black *et al.*, 6 Gray, 100.
Chase *vs.* Denny, 130 Mass. 566.

The law of the State is accepted as to the validity of the mortgage.

Etheridge *vs.* Sperry, 139 U. S. 266, 277.
Haskell *vs.* Merrill, 179 Mass. 120.

Second. The intent of the Bankruptcy Statute with reference to unrecorded mortgages is found in Sections 67a and 67e. This is the section which applies to the case at bar, and not 60a and 60b.

Section 67a would not defeat this mortgage, because at the time of filing the petition the possession taken made the mortgage good as against creditors.

The last part of 67e reads, "And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State, Territory, or district in which such property is situate, shall be deemed null and void under this act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt."

The possession taken by the plaintiff, although within the four months, satisfied the local law and therefore satisfied Section 67e. Invalidity under these clauses can be cured at any time before filing the petition.

It is important to note that the statute here recognizes the existence of transfers which are good between the parties and void as to creditors, and after four months they are held good under all the sections of the statute except 67a. Having stood for four months, it could be dealt with as though valid as to creditors and taking possession was not prohibited by the statute.

The error which the Massachusetts Court made was in considering that the transaction must stand for four months in a form valid as to every one, but it was wrong not to recognize a mortgage transfer, which was perfectly good between the parties, merely because it could be defeated by creditors intervening with attachments or the like. As stated *In re* Antigo Screen Door Company, 123 Fed. R. 249, "A law which declares an instrument valid between parties, but void as to creditors, means that it is voidable as to creditors who choose to attack it. Being valid against the parties, it is valid against the world, except those who assail it upon the grounds permitted by law."

And this mortgage was also valid before possession taken as against wrong-doers.

Mass. R. L., Chap. 198, Sect. 1.
Pratt *vs.* Harlow, 16 Gray, 379.

And before there was any intervening creditor or purchaser, it was made good even as to them by the possession taken and the words used *In re* N.Y. Economical Printing Company, 110 Fed. R. 514, are applicable. "The bankrupt act (1898) does not vest the trustee with any better right or title to the bankrupt's property than belongs to the bankrupt or his creditors, at the time when the trustee's title accrues. The present act, like all preceding acts, contemplates that a lien good at that time against the debtor and as against all of his creditors shall remain undisturbed."

Note also the words in First Nat. Bank of N.K. *vs.* Pa. Tr. Co., 124 Fed. R. 968. "The lien acquired Aug. 30, 1901, had not been lost because no rights of third parties intervened. The bank under its contract had a right of possession to the billets as security for the payment of the debt and could not be held guilty of securing a preference by exercising that right within four months preceding bankruptcy.

Third. There was no preference under 60a.

Section 60 refers wholly to transfers by the bankrupt. Whether a transfer is a preference or not depends upon whether what the bankrupt did at the time it was done operated as a preference.

When the mortgage was given, an equivalent was taken which was a full consideration. Such transactions are not preferences.

Jaquith *vs.* Alden, 189 U.S. 78.

The mortgage was an effective transfer as against the bankrupt at the date of the delivery and must be considered as a transfer of property, within the meaning of the statute, even though not valid as to intervening creditors. It did not stand as a preference, but was simply voidable by attaching creditors because not recorded, which invalidity is treated of in Sections 67a and 67e.

Taking possession by the mortgagee was not a transfer, but was the exercise of a right which was given him by the previous transfer. The bankrupt took no part in it and it was not done in the exercise of any power of attorney.

But even if the transfer should date "from the acquisition of possession," the transfer is not thereby separated from its consideration, but the whole transaction, paying of the consideration as well as the delivery of the mortgage, must be considered as having been made together just as they in fact occurred.

The transfer was complete and the plaintiff took possession of his own property and not of the property of the bankrupt.

In re Antigo Screen Door Co., 123 Fed. R. 249.
First Nat. of N.K. *vs.* Pa. Tr. Co., 124 Fed. R. 968.
In re N.Y. Economical Printing Co., 110 Fed. R. 514.
Sabin *vs.* Camp, 98 Fed. 974.
Deland *vs.* Miller & Cheney Bank, 119 Ia. 368.

Fourth. But if it were a preference, which it was not, it could not be recovered under Section 60b because there was no "reasonable cause to believe" that it was intended as a preference.

The fact of the "intent" is not one of the agreed facts and if it is not a necessary inference, which must be made as a matter of law, then there was no such intent.

Kaufman *vs.* Tredway, 195 U.S. 271.

It appears by the agreed facts that the bankrupt protested against the taking of possession and did not assist in it. Possession was taken by the plaintiff as a right and was submitted to by the bankrupt because it would have been illegal for him to do otherwise. Since an equivalent was received, there was no preference when the mortgage was delivered and no wrong intent. The bankrupt was not insolvent when the mortgage was given. The bankrupt intended to give *security* and not a *preference*. The recording and taking of possession are always acts of the mortgagee and follow the act of delivering the mortgage. If to do these things is to make a preference, no mortgage could ever be given which would not be a preference, for whether the time between the delivery and the recording or taking possession is a minute or a year, it makes no difference in principle.

This transaction would not have been an act of bankruptcy under 3a (2).

The decisions of the United States Supreme Court show that the intent is a material consideration in 60b and that more than "the result obtained by the creditor" is thought of.

Pirie *vs.* Chicago T. & T. Co. 182 U.S. 438.
Wilson *vs.* Nelson, 183 U.S. 191.
Metcalf *vs.* Barker, 187 U.S. 165.

"In order to constitute a preference the debtor must do some act to facilitate the proceedings; submissive inactivity is not enough."

Johnson *vs.* Anderson, 11 Am. B.R. 294, 302.

Fifth. The transaction did not occur within the four months.

It is admitted that the original transfer was good between the parties and it must therefore be recognized as a transfer of property, within the meaning of the statute at the time the mortgage was delivered.

The transfer would not have been treated as a preference under 60a and 60b, if possession had not been taken; why should it be so treated after possession was taken? The four months mark the limit of the trustee's power to attack a transaction for illegality of this kind, where the transfer is good between the parties, and this four months

cannot be prolonged by further acts of the creditor with reference to the same matter.

The Massachusetts Court says (p. 14 of the record): "The transfer dates . . . from the acquisition of possession under the mortgage."

The Court relied upon the authority of Wilson *vs.* Nelson, 183 U.S. 191, and drew an analogy from Sections 3a and 3b of the statute.

From Wilson *vs.* Nelson this conclusion was drawn (p. 13 of the record): "It was held that in determining the time of an alleged act of bankruptcy it must be deemed to have occurred when something open and notorious was done affecting the debtor's estate."

After a careful examination of the case, the plaintiff fails to find anything to justify this statement. That decision was based upon the use of the words "suffered and permitted" and the omission of the words "with intent to give a preference."

No analogy can be drawn from Section 3b. The fact that provision is there made that the time shall not expire till four months after "notorious, exclusive or continuous possession is taken" and is omitted in other sections is in itself an argument that the other sections were not intended to operate in the same way.

There is a wide difference in the meaning of the statute provision and the conclusion which the Court drew.

The statute expression is: The time shall not expire till four months from the time of taking possession.

The Court's expression is: The transaction dates from the acquisition of possession.

The first form does not change the relation of the facts, and, if the transaction as at first made was not a preference, taking possession has no effect. Taking possession is treated merely as notice of the previous transaction.

The second form considers the facts out of the order of their occurrence, separates the transfer from its consideration, treats the taking of possession as in itself a wrongful act and claims a preference by a mere juggling of dates where none existed before.

Under Section 3a (2) this transaction was not an act of bankruptcy and the taking of possession would not make it such by force of the provision of Section 3b.

The Massachusetts Court speaks of (p. 14 of the record) "the proceedings by which the mortgagee obtained his lien three weeks before the filing of the petition."

A mortgage is sometimes spoken of as a "lien" because it is security for a debt, but it is in the nature of an equitable lien which exists without possession, which is not true of a pledge, for it is admittedly good between the parties before possession is taken. The above expression by the Court must not be taken to mean more than was intended,— it means simply that the mortgage was made effective as against attaching creditors or the like, three weeks before

filing the petition, but does not deny the existence of the transfer or lien as between the parties before that time.

In this case, whether the property taken was owned by the bankrupt at the time of giving the mortgage or was after-acquired property, makes no difference, and the agreed facts do not show that any after acquired property was taken. The Massachusetts Court considered it as a mortgage of property owned at the time of the delivery of the mortgage.

The distinction between a mortgage and a pledge is clear in Massachusetts, the first being a transfer of title and the other being merely a transfer of possession, while the general title remains in the pledgor.

Walker *vs.* Staples, 5 Allen, 34.
Thompson *vs.* Dolliver, 132 Mass. 103.
Harding *vs.* Eldridge, 186 Mass. 139.

The lien did exist for more than four months before possession taken, although it was voidable as to attaching creditors and the four months provision, as a statute of limitations, made it valid as to the trustee under every section of the statute except Section 67a.

An unrecorded real estate mortgage does not differ materially from an unrecorded chattel mortgage. Such a mortgage was held good from the date of delivery, though not recorded till within the four months.

Pratt *vs.* Christie, 95 App. Div. (N.Y.) 282 (12 Am. B. R. 1).

A deed made within four months in pursuance of a previous agreement was held good.

Murray *vs.* Beal, 23 Utah, 548.

Sixth. Taking possession by the mortgagee, which was done some time before foreclosure proceedings were begun, was in no sense a "legal proceeding" or a "suit or proceeding at law or in equity" under Sections 67c and 67f.

The lien was created by the acts of the parties and not by a legal proceeding. The lien began in the transfer and was perfected as to creditors by possession.

Seventh. The property would not pass to the trustee under 70a, which only gives "the title of the bankrupt as of the date he was adjudged a bankrupt."

Hewit *vs.* Berlin Machine Works, 194 U.S. 296.

Eighth. Section 67d clearly exempts the plaintiff's mortgage.

The decision of the Massachusetts Court and the agreed facts show that the mortgage was given in good faith. At the time when the

mortgage was in fact given and accepted, it was given as security and not in fraud upon the act under the theory of all parties. At the time the mortgage was given and accepted the consideration was a present one, the recording was not necessary to give notice, because possession could be taken to serve that purpose, and possession was taken which related back to the giving of the mortgage. The transaction then should receive the protection of the Bankruptcy Act.

Ninth. Under the Act of 1867 the transaction would have been legal and not a preference.

Gibson *vs.* Warren, 14 Wall, 277.
Sawyer *vs.* Turpin, 91 U.S. 114.
Clark *vs.* Iselin, 21 Wall, 360, 372.
Steward *vs.* Platt, 101 U.S. 731.
Hauselt *vs.* Harrison, 105 U.S. 401.

The sections of the Act of 1867 corresponding to Section 60b are in effect the same.

R. St. U.S., Sect. 5128 and Sect. 5129.

Tenth. While some cases are found seemingly deciding the question against the plaintiff's contention, many of them must be read with reference to the local law and can be distinguished.

Reference is also made to cases cited in the brief printed below.

WM. H. BROWN,
Atty. for Plaintiff in Error.

Below is printed a copy of the brief which was filed in the Supreme Judicial Court of the Commonwealth of Massachusetts, and a certified copy of which is filed as a part of the record of this case.

COMMONWEALTH OF MASSACHUSETTS, } ss.:
Worcester. }

Supreme Judicial Court.

CHARLES T. TATMAN, Trustee. }
vs. }
JOHN B. HUMPHREY. }

Defendant's Brief.

1. The facts having been agreed upon, necessary inferences only can be drawn.

Mayhew *vs.* Durfee, 138 Mass. 584.
Collins *vs.* Waltham, 151 Mass. 196.
Swarz *vs.* Boston, 151 Mass. 226.
Rand *vs.* Hanson, 154 Mass. 87.

2. The plaintiff makes his principal complaint that the mortgage was not recorded. Recording, however, would not have helped so far as after-acquired property was affected.

Blanchard *vs.* Cook, 144 Mass. 207.

There is no provision in the Bankruptcy Statute of the United States which requires mortgages of personal property to be recorded. We must examine the Massachusetts statute and the construction of that statute by the Massachusetts cases to see whether there is any illegality because of the failure to record the mortgage and in the defendant's act of taking possession of the property covered by the mortgage.

Folsom *vs.* Clemence, 111 Mass. 273.
Haskell *vs.* Merrill, 179 Mass. 120.

Previous to the statute it was not necessary to record a mortgage, or to take possession of the property to be protected against third persons.

Holmes *vs.* Crane, 2 Pick. 607.
Wright *vs.* Tetlow *et al.*, 99 Mass. 397.

A mortgage is valid which gives a power to sell in the ordinary course of business.

Fletcher *vs.* Powers, 131 Mass. 333.
Blanchard *vs.* Cook, *ubi supra.*

A mortgage to secure future advances is valid.

The Commercial Bank *vs.* Cunningham, 24 Pick. 270.
Codman *et al. vs.* Freeman, 3 Cush. 306.
Barnard *vs.* Moore *et al. and tr.*, 8 Allen, 273.

A mortgage which covers after-acquired property is valid.

Bennett *vs.* Bailey, 150 Mass. 257.
Bliss, *assignee vs.* Crosier *et al.*, 159 Mass. 498.
Chase *et al. vs.* Denny, 130 Mass. 566.

The fact that the mortgage is not recorded does not make it invalid.

Folsom *vs.* Clemence, 111 Mass. 273.

The act of taking possession relates back to the time of the execution of the mortgage.

Mitchell *et al. vs.* Black *et al.*, 6 Gray, 100.
Chase *vs.* Denny, *ubi supra.*

Taking possession of property under a mortgage made previous to the four months, whether recorded or not, would not be a preference.

See cases, *ubi supra.*

3. The bankruptcy act does not affect a mortgage given in good faith for a present consideration, though not recorded, where recording is not necessary, whether made before or within the four months.

Bankruptcy Law 1898, Sect. 67, cl. d.

This provision is merely negative and does not state what liens or transfers are invalid. The consideration which was given at the time of making the mortgage, and which was afterwards increased, was a present consideration for the whole transaction. No separate consideration was necessary at the time of taking possession. The taking of possession almost always follows, or may follow, the making of the mortgage. It would seem to be immaterial whether the time that elapses between the date of delivering the mortgage and of taking possession of the property is a day or a year.

Since the conveyance was not made by the bankrupt within four months, Sects. 60 and 67 of the bankruptcy act have no application.

The taking of possession was entirely an act of the defendant, the bankrupt took no part in it. A careful reading of the above sections

shows that the bankrupt must himself have done something within the four months in order to make a preference, or an invalid lien, otherwise it would be invalid for a mortgagee under any mortgage to take possession of property within the four months.

Pirie *vs.* Chic. Title & Tr. Co., 182 U.S. 438.
Wilson *vs.* Nelson, 183 U.S. 191.
Metcalf *vs.* Barker, 187 U.S. 165.

4. This bankruptcy act, so far as it has any application to this case, does not differ from the old bankruptcy act, and under the old act this mortgage, where possession was actually taken, although within the four months, would have passed without question.

Clark *vs.* Iselin, 21 Wall, 360, 372.
Stewart *vs.* Platt, 101 U.S. 731.
Hauselt *vs.* Harrison, 105 U.S. 401.

WILLIAM H. BROWN,
Att'y for the Defendant.

Henry W. Putnam,
of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1904, *No. 169.*

JOHN B. HUMPHREY,
Plaintiff in Error,
against
CHARLES T. TATMAN, Trustee in Bankruptcy of Nelson H. Davis.

MEMORANDUM ON BEHALF OF DEFENDANT IN ERROR.

Statement of the Case.

This is a writ of error to the Superior Court of the State of Massachusetts to review the judgment of that Court, involving questions as to the construction of the United States bankrupt act of 1898. The action was one of tort and was brought by a trustee in bankruptcy to recover the value of the bankrupt's stock of jewelry, alleged to have been converted by Humphrey to his own use, and alleged to have been obtained by him as a fraudulent preference. The debtor, while solvent, had given Humphrey a mortgage in the year 1899, purporting to cover his stock and all future acquisitions thereto, to secure existing and future indebtedness. This mortgage was never recorded, and no possession was taken until about three weeks before the debtor's filing of a voluntary peti-

tion in bankruptcy in 1901, when, the debtor being in fact insolvent, Humphrey, having reasonable cause to believe him insolvent, took all the goods away, and appropriated them, and started foreclosure proceedings. The debtor had represented to creditors and to commercial agencies that there was no incumbrance on his stock of goods. Humphrey refused to give up the goods to the trustee, when chosen. The case was submitted to the Court on a statement of agreed facts, and a judgment was rendered in favor of the trustee in bankruptcy in the sum of two thousand eight hundred and ninety dollars.

POINT I.

The transfer did not take place until possession was taken.

The Massachusetts statute (Revised Laws, ch. 198, sec. 1) requires that chattel mortgages shall be recorded within fifteen days from their date, and concludes as follows:

> "Unless the property mortgaged has been delivered to and retained by the mortgagee, the mortgage shall not be valid against a person other than the parties thereto until it has been so recorded; and a record made subsequently to the time limited shall be void."

This is a statute "to secure publicity."

Smith vs. *Howard,* 173 Mass., 89.

An assignee in insolvency or a trustee in bankruptcy is not one of the parties within the meaning of the statute.

Blanchard vs. *Cooke,* 144 Mass., 207 at 226.
Bingham vs. *Jordan,* 1 Allen, 373.
Haskell vs. *Merrill,* 179 Mass., 120.

In the case of *Haskell* vs. *Merrill (supra)*, the Massachusetts Supreme Judicial Court decided that a trustee in bankruptcy under the law of 1898 was not one of the parties within the meaning of the Massachusetts recording statute, and that an unrecorded chattel mortgage was void so far as the trustee was concerned, no delivery of possession ever having been made. Attention was called by Holmes, *C. J.* (p. 124), to the accepted doctrine that "the construction of a State statute is a matter upon which the decision of the State court is final."

See also *In re H. G. Andrae Co.*, 117 Fed. Rep., 561.

During the time while the mortgage was withheld from the record and no possession taken, this mortgage had no validity so far as the subsequently appointed trustee in bankruptcy or any one other than the debtor was concerned. That is, whatever validity it had, started then. In other words, the transfer by way of mortgage never existed or took place, so far as the trustee is concerned, until possession of the goods was taken. The transfer took place then, because it had no validity until then. The lien attempted to have been created by the mortgage did not exist until possession was taken, because the statute of Massachusetts provided that there should be no lien unless possession was taken or the mortgage publicly recorded.

The Supreme Judicial Court of Massachusetts, in the case at bar, has virtually said that under the State recording statute there is no relating back of the title from the date of taking possession to the date of the mortgage. So the former decisions of that Court, under the bankrupt act of 1867 upholding such takings of possession, could not have proceeded upon the theory that there was such a relating back, or else that Court now means to overrule all its old decisions in such cases.

The case of *Moody* vs. *Wright*, 13 Met., 17, at p. 32, held

that such a mortgage is a mere executory agreement. The Court said, by Dewey, *J.*:

> "The property cannot be held as charged with a lien, because a lien cannot be created by an executory agreement, without being accompanied by possession or delivery of the property."

And in construing the same statute, the same court through Gray, *J.*, said in the case of *Wright* vs. *Tetlow*, 99 Mass., 397, at 400:

> "The manifest intention of the Legislature was to require in the case of an unrecorded mortgage of chattels, such delivery of possession as would be necessary in the case of an absolute sale, which need not be recorded."

This was in line with what was said by Swayne, *J.*, in the case of *Gibson* vs. *Warden*, 14 Wall., 244, at 247:

> "A chattel mortgage is only a bill of sale with a defeasance incorporated in it."

It is therefore reasonable to conclude that the Supreme Judicial Court of Massachusetts was right in saying in the case at bar, that the transfer dates from the acquisition of possession under the mortgage.

The case of *Matthews* vs. *Hart*, 79 App. Div., 570, was a case in the Appellate Division of the Supreme Court of New York. It was a petition by a receiver in bankruptcy to have a certain conveyance set aside as a fraudulent preference. The creditor having the benefit of the transfer had had an oral agreement with the debtor at a time when the debtor was solvent, that the said creditor should have a lien upon the debtor's goods for all advances made. The defendant, the creditor, took possession of the property within four months before the bankruptcy proceedings were begun. At the time he had

sufficient cause for believing that by taking possession he would obtain a preference. Held that the preference should be deemed to have dated at the time when possession was taken. The Court said, by O'Brien, *J.*:

> "If the bankruptcy act is susceptible of the construction which under the decisions has been given to it, that a transfer is to be regarded as of the date when possession is taken, then, though the taking of possession was merely, as in this case, to effectuate an agreement made in good faith and many months before the prohibited time for giving a preference the transfer, if the creditor had reasonable cause to believe when such possession was taken that a preference was intended, is nevertheless one which under the act is voidable so that the trustee may maintain an action to recover the property or its proceeds."

To the same effect are the following cases:

In re Sheridan, 98 Fed. Rep., 406.
Landis vs. *McDonald*, 88 Mo. App., 335.
In re Ronk, 111 Fed. Rep., 154.

The case of *Hewit* vs. *Berlin Machine Works*, 194 U. S., 296, only decides that where a New York statute makes conditional sale agreements void as to subsequent purchasers unless recorded, such an agreement is good against a trustee in bankruptcy, though not recorded. In that case, of course title to the goods never passed out of the creditor, and he is the one who seeks to recover his property. But our case being one of mortgage and not of conditional sale, the debtor, not Humphrey, had the original title, and Humphrey must show the fact of his getting title and the time thereof. Moreover, in our case the State statute as to recording mortgages benefits not only "subsequent purchasers," but all the world, including trustees in bankruptcy.

POINT II.

This taking of the debtor's stock was a guilty preference, and being voidable by the trustee, its value may be recovered.

Parts of the bankrupt law which must be considered are as follows:

> "Sec. 60. Preferred Creditors. a. A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."
>
> "b. If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

The amendment of 1903 added to subdivision a the following:

> "Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required."

It is submitted that this was not intended to change the effect of the act, but was rather explanatory and in furtherance of the general design thereof.

When Humphrey took the goods, the debtor was in-

solvent, and it was within four months of the filing of the petition. Inasmuch as under the Massachusetts statute and the decision of the highest Massachusetts court, the transfer took place when possession was obtained, the transfer is voidable as a guilty preference.

Of course Humphrey had reasonable cause to believe that it was intended thereby to give him a preference, for he had reasonable cause to believe the debtor insolvent, and he took all the property the debtor had. It must have been the intention of both parties, from the very nature of the whole transaction, to give and receive a preference. That intention must have continued from the date of the mortgage down to the taking of possession. The debtor had voluntarily placed himself in a position where his intention must be inferred from his written instrument, the mortgage, however strenuously he might protest against the actual taking possession.

But it is to be observed that the bankrupt act does not make it necessary for the debtor to have an intent to prefer. All that is necessary under Sec. 60 b is that the creditor or his agent shall have had reasonable cause to believe that it was intended thereby to give a preference.

A creditor who obtains a preference ought not to be heard to say that his debtor did not intend to prefer him.

Hunt, *J.*, in *Watson* vs. *Taylor*, 21 Wall., 388.

It has already been decided by this Court that "the act of 1898 makes the result obtained by the creditor, and not the specific intent of the debtor, the essential fact."

Gray, *J.*, in *Wilson* vs. *Nelson*, 183 U. S., 191, at 198.

In the same case and on the same page it was also said that the cases relied upon to support the argument that an intent was necessary on the debtor's part, were decided under the act of 1867, which expressly required the debtor to have acted with intent to give a preference.

In the case of *Western Tie & Timber Company* vs. *Brown*, 129 Fed. Rep., 728, it was held that under Sec. 60 of the bankrupt law of 1898, an intention on the part of the insolvent debtor to give a preference is not necessary to render the transfer voidable. The Court said by Sanborn, *J.:*

> "The statute does not require that it should be intended by the debtor, but is fully satisfied by the existence of an intention on the part of the actor—the person who procures, brings about or effects the transfer. The preferences denounced by the statute are often secured by creditors without any desire or intention on the part of the debtor to give them, as in cases in which the creditors obtain judgments against their debtors over defenses made to the actions in good faith, and in cases, like this at bar, where, without the consent of their debtors, creditors appropriate to the payment of their claims the property of their debtors which happens to be under their control."

To the same effect are these cases:

In re Ed. W. Wright Lumber Company, 114 Fed. Rep., 1011.

White vs. *Bradley Timber Company,* 119 Fed. Rep., 989.

POINT III.

The transfer was void if made with fraudulent intent on the debtor's part.

The language of the bankrupt law in regard to liens is as follows:

> "Sec. 67. Liens. a. Claims which for want of record or for other reasons would not have been

valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate."

"d. Liens given or accepted in good faith and not in contemplation of or in fraud upon this act and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this Act."

"e. That all conveyances, transfers, assignments or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this Act subsequent to the passage of this Act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid, shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. And all conveyances, transfers, or encumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State, Territory, or District in which such property is situate, shall be deemed null and void under this Act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt."

Here was a claim which for want of record and for want of a delivery or taking of possession, would not

have been a valid lien against anyone at any time from four months down to three weeks before the bankruptcy.

See *Gove* vs. *Morton Trust Company*, 12 Am. B. R., 297.

Torrance vs. *Bank*, 66 Kan., 177.

Section 67 d implies that liens shall be invalid if given and accepted secretly and not availed of until the debtor actually became insolvent, the defendant having reasonable ground to believe him so.

See *In re Thorp*, 130 Fed. Rep., 371.

The bankrupt law in section 67 e makes transfers with intent to defraud creditors absolutely void, recognizing all local state laws and incorporating provisions of its own in addition.

This debtor must have had a continuing intention from the time of the giving of the mortgage down to his permitting Humphrey to take the goods, to hinder, delay and defraud his other creditors, because he placed himself in a position where it was his duty while he was in default, to deliver the goods to Humphrey. In case he became insolvent (as he was when possession was taken), it would still be his duty under his contract with Humphrey to deliver over the goods, and of course this would result in defrauding his other creditors.

The Massachusetts case of *Blanchard* vs. *Cooke*, 144 Mass., 207, at 227, holds that there need be no act of the mortgagor to constitute a delivery, but that the mortgagee's taking possession is sufficient, because it would be the duty of the mortgagor under his mortgage to deliver. In like manner why can we not infer his continuing intention from his irrevocable act? In a similar case (*Watson* vs. *Taylor*, 21 Wall., 378), Hunt, *J.*, took similar ground, saying:

> "Every person is deemed to contemplate the natural result of his acts, and is responsible for all the results that legitimately follow them. A debtor who confesses a judgment cannot be heard to say

that he did not contemplate the issuing of an execution thereon."

See also *Buckingham* vs. *McLean*, 13 How., 151.
Toof vs. *Martin*, 13 Wall., 40.
In re Ed. W. Wright Lumber Company, 114 Fed. Rep., 1011.

In this matter there was no "present fair consideration" when the open, public act was done. The consideration was two years old when Humphrey took possession, and that was the time, if ever, when his rights began under the State law, against this trustee in bankruptcy.

POINT IV.

The different sections of the bankrupt law must be construed together, and the act must be read as a harmonious whole.

Sec. 3 of the bankrupt law relates to acts of bankruptcy and in paragraph b thereof it says:

"b. A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy, within four months after the commission of such act. Such time shall not expire until four months after (1) the date of the recording or registering of the transfer or assignment when the act consists of having made a transfer of any of his property with intent to hinder, delay or defraud his creditors or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or if it is not, from the date when the beneficiary

takes notorious, exclusive or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment."

This shows that the spirit and purpose of the bankrupt law is to consider fraudulent all transfers which ought to be recorded but which are kept secret. The object in setting the time limit of four months after record made or possession taken was to admit of the trustee in bankruptcy claiming the goods so transferred. There is no object in making such a transfer and delivery of possession an act of bankruptcy unless the creditors are to have the advantage of getting back the property or its value.

In a decision made by this Court under the bankruptcy law of 1841, to wit, the case of *Buckingham* vs. *McLean*, 13 How., 151, the Court said, by Curtis, *J.*:

> "It cannot be supposed that what was in itself an act of bankruptcy, and done for the purpose of giving a preference over the general creditors, was intended to be left valid and effectual to defeat one of the two great objects of the law, which were to grant a discharge to honest debtors who should conform to its provisions, and to distribute their property ratably among all their creditors."

The United States District Court for the Southern District of Iowa (Shiras, *J.*) has dealt with a similar question in the case of *In re Charles S. Klingman*, 101 Fed. Rep., 691. The claimants shipped the goods to the debtor, stipulating that the goods were "pledged and hypothecated" to them as security for the payment of the purchase price. Within four months of the adjudication in bankruptcy the claimants learned that the debtor was insolvent, and they secured the return of a part of the goods before bankruptcy proceedings were

begun. Held that the claimants cannot prove their claim without surrendering this preference. The Court said:

> "In my judgment, it was the purpose of this enactment to declare generally that, with respect to acts of bankruptcy consisting of making transfers of property when insolvent with intent to give a preference, the act is to be held to have been committed when the transfer is made effectual as against other creditors by recording or registering the instrument of transfer, or by the beneficiary taking actual and open possession of the property, or by otherwise giving actual notice of the transfer to creditors. In other words, the intent of this section is to declare that, as against creditors of an insolvent, the limitation of time for invoking relief against a preference does not begin to run until in some form they have received actual or constructive notice of the transfer to the preferred creditor; and this intent is reached by the declaration that in such cases the transfer constituting the act of bankruptcy shall be held to date from the time the instrument of transfer is recorded, or the possession is taken, or notice is otherwise brought home to the creditors of the bankrupt."

POINT V.

This was a lien obtained through legal proceedings within four months of the filing of a petition in bankruptcy, and was therefore null and void.

Section 67, subdivision f of the bankrupt law provides as follows:

> "f. That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a

person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: *Provided*, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

The Supreme Judicial Court of Massachusetts, in the case at bar (*Tatman* vs. *Humphrey*, 184 Mass., 361), holds that the time of taking possession must be considered as the date of the creation of the lien, and after discussing Sec. 67 f and Sec. 67 c of the bankrupt law, the opinion by Knowlton, *C. J.*, says at p. 364:

> "Even though the proceedings by which the mortgagee obtained his lien, three weeks before the filing of the petition, were not proceedings in court, and not legal proceedings if the term is construed narrowly, they were proceedings to enforce his legal rights. If the present case is not covered by the decision in *Wilson* vs. *Nelson*, *ubi supra*, the principles upon which the two cases rest are very similar."

The Supreme Court of the United States in the case of *Wilson* vs. *Nelson*, 183 U. S., 191, holds that the debtor's

failure to discharge a preference in the nature of a judgment procured within four months of the filing of the petition, under an irrevocable power of attorney to confess a judgment, given years before, is an act of bankruptcy. The majority opinion, by Gray, *J.*, discusses all the sections of the act bearing on preferences and construes them harmoniously, holding that the result obtained by the creditor, and not the specific intent of the debtor, is the essential fact. Distinction is drawn between the bankrupt law of 1867 and that of 1898, in that the former expressly required the debtor to have acted with intent to give a preference.

It is to be observed that there is another clause of Sec. 67 which refers to proceedings in court, and does not use the phrase "legal proceedings," to wit, subdivision c, which reads as follows:

> "c. A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person, shall be dissolved by the adjudication of such person to be a bankrupt if
>
> (1) it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference, or
>
> (2) the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or
>
> (3) that such lien was sought and permitted in fraud of the provisions of this Act;
>
> Or if the dissolution of such lien would militate against the best interests of the estate of such person, the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder

of such lien and empowered to perfect and enforce the same in his name as trustee with like force and effect as such holder might have done had not bankruptcy proceedings intervened."

In a case in the Southern District of New York, the District Court held that a mechanic's lien, under New York laws, obtained by filing a notice thereof, is a voidable preference if for an antecedent indebtedness, and that it is a legal proceeding within the meaning of Sec. 67 f. Brown, *J.*, called attention to the provisions of subdivisions c and f of Sec. 67, and to the differences of language employed in them. He said:

"This lien was obtained through a 'legal proceeding,' within the meaning of section 67 f. The words 'legal proceeding' are not terms of art. They have no strictly technical meaning, but are here used in a general sense. In their narrower meaning they signify a proceeding at law or in equity. But in a wider sense, they embrace every proceeding established by law for acquiring a right, or enforcing a remedy. In this sense the foreclosure of a mortgage by advertisement under the statute is as truly a 'legal proceeding' as a foreclosure by a suit in equity; the one is a statutory remedy out of court; the other, a remedy in and through the court. Both are equally legal proceedings. If there were doubt in which sense the expression 'legal proceedings' is used in section 67 f, the wider sense should be adopted, '*Ut res magis valeat quam pereat,*' that the main object of the act, viz., equality among creditors may be saved and not lost. * * * * It is urged that the words 'legal proceedings' in section 67 f should be held to mean the same thing as the words 'any proceeding at law or in equity' in section 67 c. On the contrary, since it is patent from the general scope of section 67 f that it was intended to be much broader in its application than section 67 c, the use of the broader words, 'legal proceedings,' in section 67 f should be taken to have been deliberately chosen, so as not to confine its operation to preferences ac-

quired through proceedings in court alone, but in order to effect with other sections a complete and harmonious execution of the bankrupt act, by avoiding all intentional preferences of antecedent debts, however acquired, whether voluntarily by the bankrupt's own act, or involuntarily by any adverse proceeding authorized by law and resorted to by the creditors for the same end."

In re Emslie, 98 Fed. Rep., 716.

In the District Court of the United States for the District of Vermont, it was held that a taking of possession through a public officer for the purpose of foreclosing a chattel mortgage, pursuant to the laws of Vermont, constituted the obtaining of a preference through a "legal proceeding" under Sec. 67 f.

In re Ball, 123 Fed. Rep., 164.

It has been held by this Court that a lien obtained more than four months before the filing of a petition in bankruptcy is recognized as valid by the bankrupt law, although not perfected until within the four months, but that where a lien is obtained within four months, the property is discharged therefrom by the bankruptcy.

Metcalf vs. *Barker*, 187 U. S., 165.

But in the case at bar the *lien* was not obtained and did not exist, under the Massachusetts law, so far as this trustee is concerned, until possession of the goods was taken, three weeks before the filing of the petition.

Haskell vs. *Merrill*, 179 Mass., 120.
Tatman vs. *Humphrey*, 184 Mass., 361.

POINT VI.

This whole transaction was a fraud upon the law.

This unrecorded chattel mortgage was made after the bankrupt law had gone into effect, and there can be no question that it was made subject to the provisions of that law. The trustee here claims that keeping the mortgage secret until Humphrey had cause to believe the debtor insolvent and the taking possession then were in fraud of the law; that the debtor is conclusively presumed from the unrecorded mortgage itself to have had a continuing intention to defraud his other creditors in the event of his becoming unable to pay his debts, and a continuing intention to give Humphrey a preference; that Humphrey ought not to be heard to say that he had not reasonable cause to believe that the debtor intended to prefer him, when Humphrey took possession of the goods by virtue of the debtor's written mortgage; that the trustee in bankruptcy had a right to get the goods back, and that Humphrey's refusal to give them up renders him liable to the trustee for their value.

> "Acts done under a valid state law may yet be acts of bankruptcy." "Conveyances perfectly valid between the parties, and not fraudulent in the ordinary sense, are yet constructively fraudulent when assailed within a certain time, if they interfere with the operation of the system established by the bankrupt law." Lowell on Bankruptcy, Sec. 12.

The necessary conclusion from the agreed facts is that the transaction was a fraud worked in concert by the debtor and Humphrey. Humphrey rendered his mortgage secret by keeping it off the record, and the debtor's conduct was harmonious in his stating to his creditors

and the world that there were no incumbrances on his stock.

In the case at bar the Supreme Judicial Court of Massachusetts has construed the Massachusetts recording act and the United States bankrupt act together as making Humphrey liable for the value of the stock, and used the following language in the opinion by Knowlton, *C. J.*:

> "The reason for the enactment as it is interpreted is well illustrated by the fact that the mortgagor in this case, less than four months before the proceedings in bankruptcy, made a statement to certain of his creditors and to commercial agencies, that there was no incumbrance on his stock or fixtures, a statement which was literally true if we look only to the state of the title as against creditors, but wickedly false in its understood meaning if the mortgagee, on the eve of the debtor's bankruptcy, could take all of the debtor's property and leave nothing for the other creditors who had trusted him because of his possessions."
>
> *Tatman* vs. *Humphrey*, 184 Mass., 361 at 365.

CHARLES T. TATMAN,

For the Defendant in Error.

Supreme Court of the United States.

No. 169.—October Term, 1904.

John B. Humphrey, Plaintiff in Error, vs. Charles T. Tatman, Trustee in Bankruptcy of Nelson H. Davis.	In Error to the Superior Court of the State of Massachusetts.

[April 17, 1905.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an action brought by a trustee in bankruptcy, the defendant in error, to recover an alleged preference. The case was heard on agreed facts, which may be summed up as follows: Davis filed a voluntary petition in bankruptcy on May 23, 1901. Two years before, on May 6, 1899, being then solvent, he executed to the plaintiff in error, Humphrey, a mortgage of his present and after-acquired stock in trade and fixtures, which covered the goods in controversy; but the mortgage was not recorded, and the goods remained in Davis' possession. On April 30, 1901, Humphrey, having reasonable cause to believe that Davis was insolvent, took possession of the goods, in accordance, it fairly is implied, with the terms of the mortgage, although against the wishes and protest of Davis. The defendant in error was qualified as trustee on June 18, 1901, and at once demanded the goods without payment of the mortgage debt. The case went from the Superior Court to the Supreme Judicial Court of the State, and the latter Court ordered judgment for the plaintiff, 184 Mass. 361, which was entered below, and thereupon the case was brought here.

It may be assumed in view of the recent decision in *Thompson* v. *Fairbanks*, 196 U. S. 516, that, if the taking possession was good as against the trustee in bankruptcy so far as the Massachusetts law is concerned, it should be held good here. We assume also, without deciding, that if, as against the trustee, the mortgage is to be regarded as first having come into being when the mortgagee took possession, it would be void. In the latter view the anomalous case would be presented of a mortgage of all a man's stock in trade to secure a past debt, executed to one who had reasonable cause to believe that the mortgagor was insolvent and that he was receiving a preference, but executed without intent to prefer on the part of the mortgagor. There would be a preference within the definition in § 60*a*, and the mortgagee would know it, but he could not be said in a strict sense to have reasonable cause to believe that it was intended to give a preference.

We assume, for purposes of decision, that such a case must be regarded as falling within the intent of the act.

The question then is one of Massachusetts law, and unfortunately the decision does not leave us free from doubt upon that point. If hereafter the Supreme Court of the State should adopt a different view from that to which we have been driven this case would cease to be a precedent. The language of the Massachusetts statute is, "unless the property mortgaged has "been delivered to and retained by the mortgagee, the mortgage shall not "be valid against a person other than the parties thereto, until it has been "so recorded; and a record made subsequently to the time limited [fifteen "days] shall be void." Mass. R. L. c. 198, § 1. There are cases which indicate that an assignee in bankruptcy is a universal successor like an executor or a husband, and so that, as it is put in Lowell, Bankruptcy, § 309, the assignee is the bankrupt. *Phosphate Sewage Co.* v. *Molleson*, 5 Ct. of Sess. Cas. (4th Ser.) 1125, 1138. *Royal Bank of Scotland* v. *Cuthbert*, 1 Rose, 462, 481. *Selkrig* v. *Davies*, 2 Dow. 230, 248; *S. C.*, 2 Rose, 291, 317. So in the Roman law *Bonorum emptor ficto se herede agit.* Gaius, IV, § 35. But it is the settled law of Massachusetts that such a fictitious identity does not satisfy the statute, that the trustee in bankruptcy is "a person other than the parties thereto," and that therefore as against him the mortgage is void. *Bingham* v. *Jordan*, 1 Allen, 373. *Blanchard* v. *Cooke*, 144 Mass. 207, 226. *Haskill* v. *Merrill*, 179 Mass. 120, 124, 125. *Haskill* v. *Merrill* is cited and relied on in the Supreme Court of the State, and we assume that it and the other cases cited still correctly state the law. It is clear under these cases that recording or taking possession after the qualification of the trustee would be too late, and it certainly would seem not illogical to hold that as against him the mortgage was to be treated as non-existent at any earlier date until the things were done which made it good under the act. In this case the court speaks of "the proceedings by which the mortgagee obtained his lien, three weeks before the filing of the petition," which at least suggests if it does not adopt the idea that the mortgage then first came into being as against the trustee.

On the other hand the Court says in terms that "the defendants' acqui- "sition of possession of the mortgaged property before the commencement "of the proceedings in bankruptcy, and before third persons had ac- "quired liens or rights by attachment or otherwise, gave him a title which "was good at common law against creditors, and which would have been "good against an assignee in insolvency under the statutes of this Com- "monwealth, or against an assignee in bankruptcy under the United States "Bankruptcy Act of 1867." We feel bound, on the whole, to take this as expressing a deliberate attitude of the court on the question under discussion, as undoubtedly that has been its attitude in the past.

In *Briggs* v. *Parkman*, 2 Met. 258, [1841,] a messenger in insolvency took possession of the mortgaged property on July 15, at half-past one. At half-past three the mortgage was recorded. The first publication of the notice of issuing the warrant to the messenger was on July 16, and hat by the terms of the insolvent law fixed the time when the property passed. It was held that the mortgage was valid as against the assignee in insolvency. In *Mitchell* v. *Black*, 6 Gray, 100, [1856,] a similar decision was made as to a bill of sale by way of security, and it was intimated that the law did not interfere with the action of purchasers in perfecting a title under a contract to which there was no legal objection when made. This case was relied on in *Sawyer* v. *Turpin*, 91 U. S. 114, a case like the present, decided as we decide this, and cited by the Court below. In *Bingham* v. *Jordan*, 1 Allen, 373, [1861,] which decided that the assignee in insolvency was not a "party" within the statute, *Briggs* v. *Parkman* was referred to for its implications in favor of that view, without a hint that the decision was disapproved and seemingly with no consciousness of inconsistency. Finally, in *Folsom* v. *Clemence*, 111 Mass. 273, [1873,] twelve years after *Bingham* v. *Jordan*, it was held that a mortgage made more than six months before the date of a petition in bankruptcy and recorded within the six months was valid. This case also betrays no sense of inconsistency with its predecessor and is cited by the Supreme Court of Massachusetts as authority for its last quoted statement of law. See further *Bliss* v. *Crosier*, 159 Mass. 498.

As the Supreme Court of Massachusetts says that taking possession under the mortgage within four months would be valid as against the trustee in bankruptcy but for supposed peculiarities of the present bankruptcy law, and as *Thompson* v. *Fairbanks*, 196 U. S. 517, although distinguishable from the present case, decides that it is valid under the present bankruptcy law if good by the laws of the State, it follows that the mortgagee was entitled to keep his goods and that the judgment against him was wrong.

Judgment reversed.

True copy.

Test:

Clerk Supreme Court, U. S.